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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~559~~ 18

UNITED STATES, *Petitioner,*

v.

THE WESTERN PACIFIC RAILROAD COMPANY,
BANGOR AND AROOSTOOK RAILROAD COMPANY,
SEABOARD AIR LINE RAILROAD COMPANY,
Respondents.

On Petition for Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

The basic reason for the petition for certiorari in these cases is that the Government wants to obtain a belated review by this court of the decision of the Court of Claims in an earlier case, *Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390, in which the

Government did not apply for certiorari. In that case the Court of Claims held that steel bomb bodies filled with incendiary gels, without bursters and fuzes, were properly classified and rated as incendiary bombs. In these cases in which review is now sought the Government stipulated that the issue was the same and that unpaid balances on their freight bills were due the respondents on the basis of the decision in the *Union Pacific* case. The respondents moved for summary judgment. The court below granted the motions and entered judgments for the respondents. The Government asks this court to review those judgments, urging that the decision of the Court of Claims on the issue stated was wrong, that at all events the court should have stayed action and referred these cases to the Interstate Commerce Commission for a determination of the reasonableness of the classification and rating of the articles in question as incendiary bombs, and that in refusing to do so the court misconstrued Section 16(3) of the Interstate Commerce Act.

QUESTIONS PRESENTED

The statement in the petition for certiorari of the questions presented distorts the decision of the Court of Claims and is inaccurate and misleading. A fair statement of the questions which the Government seeks to have reviewed is:

1. Whether the court below erred, on the record and in the circumstances of these cases, in refusing to order a "referral" of these cases to the Interstate Commerce Commission or in refusing to stay action to enable the Government to take the cases to the Commission.

2. Whether steel bomb bodies filled with incendiary gels, without bursters and fuzes, should be classified and rated as incendiary bombs, or as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or in the alternative as analogous to dummy bombs or other articles of the 5th class.

First Question

Any discussion of this question requires a short statement with respect to the earlier case on which the court's decision in these cases was based, *Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390, as well as a statement of the issue made in these cases and the court's decision which the Government is asking this court to review.

In the *Union Pacific* case the question submitted and decided was whether articles described as incendiary bombs, NP or PT1 filled, without bursters and fuzes, should be classified and rated as incendiary bombs, or—as the Government contended—as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or in the alternative as analogous to dummy bombs or other articles of the 5th class. 125 C. Cls. 390, at page 392.[1]

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[1] The findings of fact, 125 C. Cls. 394-400, show that the plaintiff's bills for the transportation charges on the shipments in question were stated on the basis of classification as incendiary bombs and were originally paid by the Government as billed. Later, upon audit by the General Accounting Office overpayments were determined and deductions were made from other bills to recover the overpayments. The Union Pacific thereupon sued to recover the resulting underpayments on their bills for the service in question.

The *Union Pacific* case was tried and argued by the Government on the theory that the Napalm and PT1 gels were not incendiary because not self-igniting, therefore steel bomb bodies filled with Napalm and PT1, without bursters and fuzes, were not incendiary bombs. At the trial of the case witnesses were called by both parties and numerous documentary exhibits were received in evidence. The court made a finding of fact that the gels although highly inflammable were not self-igniting, but also found that the bomb bodies when filled with the gels had no purpose or use except as incendiary bombs, and concluded that the plaintiff was entitled to recover, stating in the opinion:

> "We are of the opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze. While the absence of the burster and fuze admittedly renders the shipment of the article less hazardous from a transportation standpoint, the only logical description of such an article is as an incendiary bomb. The articles as described on the bills of lading were incendiary bombs without bursters and fuzes, and they had no purpose or use except as incendiary bombs."

The *Union Pacific* case was decided on April 7, 1953, on the issue of liability, 125 C. Cls. 390. Final judgment was entered on November 3, 1953, 126 C. Cls. 947. There was no application for certiorari.[2]

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[2] In a similar case, *Southern Pacific Company* v. *United States*, 128 C. Cls. 773, judgment was entered on a stipulation of the parties agreeing to settlement on the basis of the decision in the *Union Pacific* case.

In the three cases under submission in which the Government is asking for writs of certiorari, the record shows:

1. In the *Western Pacific* case, a stipulation at pretrial conference that the shipments in question were "shipments of articles described as incendiary bombs without fuses and bursters, being like the articles transported in the *Union Pacific* case No. 49505, previously decided by this court on April 7, 1953" and that on the basis of the court's decision in the *Union Pacific* case there was a balance due the plaintiff of $14,280.06. (R. 12-13)
2. In the *Bangor & Aroostook* case, admissions in the response to the plaintiff's statement of facts for admission that the shipments in question were M47 bombs, NP filled, without bursters and fuzes, that the transportation charges had been settled and paid by the General Accounting Office on the basis of classification of the articles shipped as combination articles under Rule 18 of the freight classification and the rates applicable thereto, and that on the basis of the court's decision in the *Union Pacific* case there was due the plaintiff a balance of $73,056.95. (R. 82-83)
3. In the *Seaboard* case, admissions similar to those made in the Bangor & Aroostook case, and that on the basis of the court's decision in the *Union Pacific* case there was due the plaintiff a balance of $28,561.93. (R. 92-93)

In each case the plaintiff (respondent here) moved for judgment on the pleadings or for summary judgment under Rule 51 of the Court of Claims (R. 11, 81, 91).

The court below granted the plaintiffs' motions for summary judgment, and said in the opinion:

> "These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390. A reconsideration of the question of classification of the articles as "bombs or mines" under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case."

On the further argument that at all events the court should stay action pending a "referral" to the Interstate Commerce Commission for a determination of the reasonableness of the rates claimed and found to be applicable, the court said:

> "The Government's contention * * * is without merit. The statute of limitations has run against the Government's right to have the reasonableness determined."

(A) On the record in these cases the court did not err in refusing to refer them to the Commission. The Commission of course has no jurisdiction of the respondents' claims against the Government for the unpaid charges on their bills.[3] It is well settled that the courts have jurisdiction in such cases. *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U.S. 285; *Pennsylvania R. Co.* v. *Fox & London,* 93 F. (2nd) 669; *Texas & Pacific R. Co.* v. *Sonken-Galamba*

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[3] *J. G. Falls & Co.* v. *Chicago R. I. & P. R. Co.,* 15 I.C.C. 269; *Heid Bros.* v. *El Paso and Northeastern R. Co.,* 55 I.C.C. 416. The only remedy which carriers have for undercharges and underpayments of their freight bills is in the courts.

Corporation, 100 F. (2nd) 158; *American Railway Express Co.* v. *Price Brothers,* 54 F. (2nd) 67; *RFC* v. *Spokane, P. & S. R. Co.,* 170 F. (2nd) 96.

The Court of Claims has been called upon in many cases to decide disputes over the classification of an article or commodity or the applicable rates. *Pennsylvania R. Co.* v. *United States,* 70 C. Cls. 276 (surgical bandages); *Atchison, T. & S. F. R. Co.* v. *United States,* 74 C. Cls. 154 (airplane pontoons); *Erie Railroad Co.* v. *United States,* 79 C. Cls. 102 (bomb sights); *Union Pacific R. Co.* v. *United States,* 117 C. Cls. 534 (jeeps); *Motor Cargo, Inc.* v. *United States,* 129 C. Cls. 493 (machine gun parts). In other cases the Court of Claims has construed and applied the published tariffs and has decided whether or not the plaintiff has been paid in full for the service performed. *Atchison, T. & S. F. R. Co.* v. *United States,* 81 C. Cls. 346 (minimum carload weights), 97 C. Cls. 271 (station index numbers), 123 C. Cls. 127 (switching charges); *Pennsylvania R. Co.* v. *United States,* 129 C. Cls. 781 (transit allowances).

On the record in these cases under submission the Court of Claims was bound to conclude that the respondents had not been paid in full for the service performed, on the basis of the applicable freight classification and rates, and were entitled to recover the balances claimed.

The decisions of this court cited in the petition for certiorari, as authority for a referral of these cases to the Commission, did not involve the reasonableness of classifications or rates. They involved special situations and questions such as the reasonableness and lawfulness of allowances to shippers in reduction of

their freight bills, *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 247, the reasonableness and lawfulness of payments for the use of privately owned tank cars, *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, and questions of trackage rights and contracts, abandonments, and the reorganization of railroads under the Bankruptcy Act, *Thompson, Trustee* v. *Texas Mexican R. Co.*, 328 U.S. 124.

Compare *Crancer* v. *Lowden*, 315 U.S. 631.

(B) On the record in these cases the Court of Claims did not err in refusing to stay action to enable the Government to take the cases to the Commission on the issue of the reasonableness of the freight classification and the applicable rates. The Commission has no jurisdiction of any complaint by the Government that the applicable charges on these shipments were unjust and unreasonable. *United States* v. *Director General*, 80 I.C.C. 143, 150-151; *United States* v. *Southern Railway Co.*, 286 I.C.C. 203; *War Materials Reparation Cases*, 294 I.C.C. 5, 12.

The position of the Government, it must be assumed, is that the Commission although lacking jurisdiction to award reparation on a complaint now filed by the Government may make "findings" that the applicable rates and charges on these shipments were unjust and unreasonable, and thus enable the Government not only to defeat the respondents' claims for the unpaid balances due on their freight bills, but also enable the General Accounting Office to use the Commission's findings—if made as the Government wants them made—as the basis for a determination

of overpayments and consequent cutbacks and deductions from other bills without any limitation whatever.

The suggestion that the Commission may make "findings" although lacking jurisdiction to award reparation has been rejected by the Commission. *Anaconda Copper Mining Co.* v. *Chicago & Erie R. Co.*, 19 I.C.C. 592, 594. In *United States ex rel Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U.S. 638, this court quoted with approval the decision of the Commission cited and a similar statement in the Commission's report in the case under review, as follows:

> "We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion."

In *Northwestern School Supply Co.* v. *D. L. & W. Ry.*, 140 I.C.C. 543, the Commission said:

> "As the allegation of unreasonableness was not made until more than two years after the shipments moved, that issue is barred."

It is true that in a more recent case, *Arizona Sand & Rock Co.* v. *Southern Pacific Co.*, 280 I.C.C. 285, the Commission gave consideration to such a reference from a federal district court on the ground that it is authorized by Section 5 (d) of the Administrative Procedure Act, but the assumption on which that action was based and the notion that the Commission may properly do so was dispelled by the subsequent decision of this court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, in

which this court held that the district court lacked power to refer a case to the Federal Power Commission for findings as to the reasonableness of past rates where the Federal Power Commission lacked power to award reparation. In the opinion of this court it was said:

> "If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the [Federal Power] Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly."

Finally, it should be noted that in the *War Materials Reparation Cases,* 294 I.C.C. 5, decided February 7, 1955, the Commission considered seventeen complaints filed by the Government that the rates and charges for handling Government freight during the war years from 1941 to 1946 were unjust and unreasonable (including two cases, Docket Nos. 29822 and 29861, which involved ammunition, explosives, and ammunition components). In those cases which were consolidated for hearing and decision the Commission found and concluded that the rates and charges paid by the Government were "in the aggregate considerably lower than they would have been on commercial shipments between the same points" and

that the defendants (the railroads) were not shown to have violated the Interstate Commerce Act in respect of such rates, charges, and practices.[4]

On the first question stated, therefore, there is no justification, on the record and in the circumstances of these cases, for referring these cases to the Commission or for staying action to enable the Government to take them to the Commission on the issue of the reasonableness of the classification and the applicable rates.[5]

Second Question

2. Whether steel bomb bodies filled with incendiary gels, without bursters and fuzes, should be classified and rated as incendiary bombs, or as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or as analogous to dummy bombs or other articles of the 5th class.

This question goes to the merits of the dispute between the respondents and the General Accounting Office. The statement of the question in the petition for certiorari is inaccurate and misleading because it includes unsupported and erroneous assumptions and because it misapprehends the issue which was tried and decided in the *Union Pacific* case—the same issue

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[4] A petition filed by the Government for rehearing and reconsideration is pending.

[5] There was no dissent in the court below on this issue. The dissenting opinion in these cases expressed dissatisfaction with the decision that the articles in question should be classified as incendiary bombs and would have permitted the Government to re-try the issue decided in the *Union Pacific* case—whether the articles in question were in fact incendiary bombs.

which the Government has stipulated is involved in these cases.

The supporting statement of the petition for certiorari (pages 3-8) is equally misleading because it is based—not on the trial record in the *Union Pacific* case, or on any findings of fact in these cases, but on erroneous assumptions and *ex parte* affidavits.[6] When these *ex parte* affidavits were filed there was no statement as to why the affiants were not called or could not have been called as witnesses, subject to cross examination, at the trial of the *Union Pacific* case. At that trial the Government called an expert witness, from the Army Chemical Center, who stated the same opinion. He also testified that he would not call the article in question a tube of gel and that he would call it an incendiary bomb without burster or igniter; and on cross examination, that the NP and PT1 gels were invariably referred to as incendiary gels and were so described in the Army technical manual on air chemical munitions.

The reference in the statement of the second question presented and elsewhere in the petition for certiorari (pp. 2, 6, 7, 19, 21) to the "high, first-class tariff rates" on incendiary bombs is not only improper because irrelevant but also because it is wrong in fact. *First,* it is irrelevant whether the pub-

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[6] All references in the petition for certiorari to R. 45-67 are to *ex parte* affidavits filed in opposition to the plaintiffs' motions for summary judgment in these cases. The affidavits were offered to support the argument that there was a genuine issue of fact in these cases. The gist of the affidavits is that in the opinion of the affiants Napalm gel is not incendiary because not self-igniting, therefore bomb bodies filled with Napalm gel are not incendiary bombs.

lished and applicable rates—on any articles or commodities—are high or low; the reasonableness of the rates is a matter for the Interstate Commerce Commission. *Second,* Item 1820 of the Consolidated Freight Classification did not quote any rates on incendiary bombs. It provided a classification or "rating" for incendiary bombs (first-class). The applicable rates were to be found in the rate tariffs or Section 22 quotations in effect at the time of movement and between the points of origin and destination. Besides the class rate tariffs which would be applicable in the absence of any published lower rates or Section 22 quotations, there are many tariffs of exceptions to the class rates, there are commodity rates which are invariably lower than the class rates, and there are often lower rates quoted to the Government under Section 22 of the Interstate Commerce Act. *Third,* it is a fact well known to the Department of Justice that during the war period and subsequently all ammunition, explosives, and ammunition components were handled by the railroads for the Government under Section 22 agreements at approximately 65 percent of first-class rates, without land-grant deductions. *War Materials Reparation Cases,* 294 I.C.C. 5, 137-146. In the Commission's report, page 139, it is stated that during the period included in the complaints the ratings on these commodities generally ranged from Class 32½ to Class 75,[1] and that in Mountain-Pacific territory and transcontinental territory commodity rates prevailed to an important extent; that at the request of the War Department the railroads made a Section 22 quotation of Class 65 on ammunition and explosives in carloads, minimum 50,000 pounds, appli-

[1] Percentages of first-class.

cable throughout the United States, not subject to land-grant deductions, and that the quotation appeared to have been reasonably satisfactory to the Government officials chiefly concerned until some time in 1945.[8]

The reference in the statement of the second question presented, and elsewhere in the petition for certiorari, to the regulations on Explosives and Other Dangerous Articles is irrelevant on the issue in the *Union Pacific* case and in these cases. The regulations are those prescribed by the Commission pursuant to Section 835, Title 18, U. S. Code, for the safe transportation of explosives and other dangerous articles. The regulations have no bearing on questions of the application of the published rates on such articles, *United States* v. *Gulf Refining Co.,* 268 U.S. 542, 550.

The reference to non-hazardous material in the statement of the second question presented and the statement elsewhere in the petition for certiorari that the respondents "do not attempt to justify the high rates on the basis of high hazards" are irrelevant on the issue in these cases. It would be improper for the respondents in these cases, or in any case in the Court of Claims, "to justify" the *reasonableness* of the published rates (or Section 22 agreed rates) claimed. To do so would be to convert the hearing by the court of a transportation case—which can only properly involve the question of the application of the published or agreed rates—into an Interstate Commerce Commission case for the determination of just and reasonable

[8] The complaints in the War Materials Reparation Cases were filed at various dates from 1946 to 1948 by attorneys for the Government acting under the direction of the Attorney General.

rates. The Court of Claims in exercising its jurisdiction and in deciding whether the respondents have been paid in full for the service in question cannot properly consider and decide whether the applicable rates (published or agreed) are reasonable or unreasonable. The remedy for an unreasonably high rate or classification (assuming it is unreasonably high) is with the Commission, not the courts.

On the second question stated in the petition for certiorari, it is clear that the decisions of the Court of Claims in the *Union Pacific* case:

> "We are of opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze."

and in these cases:

> "A reconsideration of the question of classification of the articles as 'bombs or mines' under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion."

are sound.

REASONS STATED FOR GRANTING THE WRITS

1. It is said that the refusal of the Court of Claims to direct a "referral" of these cases to the Interstate Commerce Commission is in conflict with *United States* v. *Kansas City Southern R. Co.*, 217 F. (2nd) 763. The *Kansas City Southern* case was first decided by the Circuit Court of Appeals for the 8th Circuit on November 19, 1954, 217 F. (2nd) 763. The judgment of the district court dismissing the complaint was vacated and the case was remanded "for such further

proceedings, on the present record or otherwise, as the District Court may deem appropriate." On rehearing, 217 F. (2nd), 769, the Circuit Court of Appeals adhered to its former opinion and ordered the mandate to issue. Judge Collett dissented and filed a dissenting opinion, 217 F. (2nd) 777. We submit that the dissenting opinion of Judge Collett correctly states the law. At all events, on the remand of the case to the District Court the latter reconsidered the matter and overruled the plaintiff's motion (the United States) for a stay pending administrative determination, and concluded:

> "Plaintiff, on the merits, is not entitled to recover any damages of defendant as here claimed. Therefore, judgment is now entered herein, on the merits, in favor of the defendant and against the plaintiff. Plaintiff's complaint is accordingly ordered dismissed."
>
> Order, June 14, 1955, in *United States* v. *Kansas City Southern Railway Co.,* in the United States District Court for the Western District of Missouri, Western Division, No. 5254.

The *Kansas City Southern* case therefore creates no conflict which this court is called upon to resolve.

It may be noted that on the same question of staying action in cases involving the collection by carriers of their transportation charges, pending a reference to the Commisison of the question of the reasonableness of such charges, the Circuit Court of Appeals for the 4th Circuit, in *United States* v. *Chesapeake & Ohio R. Co.,* 224 F. (2nd) 443, on July 14, 1955, affirmed a judgment of the District Court which denied the Government's motion to stay proceedings pending a reference to the Commission, and said:

> "Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings which the Commission is without power to entertain."

In the *Chesapeake & Ohio* case, cited above, a petition for certiorari was filed by the Government on December 9, 1955, and is now before this court, No. 560, October Term 1955.

2. It is said that the Court of Claims has misconstrued Section 16(3) of the Interstate Commerce Act. In the discussion of this point in the petition for certiorari the reference is simply to Section 16(3) without any distinction between the several subsections, (a) to (h). The sub-sections to which the petition for certiorari presumably refers are (a) and (b).

Subsection (a) provides that all actions at law by carriers for recovery of their charges, or any part thereof shall be begun within two years from the time the cause of action accrues, and not after. The Court of Claims in these cases was not called upon to give any consideration to subsection (a) because it has long been settled that when a carrier performs transportation service for the Government and is compelled to sue in the Court of Claims for its charges or for unpaid balances on its freight bills the applicable limitation period is the six years prescribed by Section 2501, Title 28, U.S. Code, and not Section 16 (3) (a) of the Interstate Commerce Act. This was decided as long

ago as 1926 in *Southern Pacific Co.* v. *United States,* 62 C. Cls. 391. The question was reconsidered in *Seaboard Air Line R. Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U.S. 848; and again in *Union Pacific R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U.S. 930.

Subsection (b) provides that all complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after. Such complaints would include charges of unreasonableness or other violations of Section 1 of the Act. In *United States* v. *Director General,* 80 I.C.C. 143, and *United States* v. *Southern Railway Co.,* 286 I.C.C. 203, the Commission held that the Government as a shipper is bound by that limitation and the Commission has no jurisdiction of a complaint filed by the Government more than two years after the accrual of the right of action.

In *Phillips* v. *Grand Trunk Western R. Co.,* 236 U.S. 662, and *Kansas City Southern R. Co.* v. *Wolf,* 261 U.S. 133, which involved claimed overcharges, this court held that Section 16(3) is jurisdictional and that the lapse of time destroys the liability as well as bars the remedy. The same rule applies to undercharges, *Midstate Horticultural Co.* v. *Pennsylvania R. Co.,* 320 U.S. 356.

In the cases under submission the Court of Claims, citing the above cases, held that the Government's right to apply to the Interstate Commerce Commission for a determination of the reasonableness of the charges claimed by the respondents and found applicable on the shipments in question is barred.

The petition (page 12) suggests that the Court of Claims has absolved the carriers from the two years limitation of (a) of Section 16(3) on their claims against the Government for undercharges (by giving effect to Section 2501, Title 28, U. S. Code), and at the same time has held the Government to the two years limitation prescribed by (b) of Section 16(3) on the filing of complaints with the Commission for damages not based on overcharges, and thus "inhibits the Government in the defense of these suits." Subsection (b) of Section 16(3) does not inhibit the Government in the defense of suits in the Court of Claims because that subsection refers to complaints for damages not based on overcharges. It does not refer to undercharges and overcharges which are the only claims of which the Court of Claims has jurisdiction. Those are claims of the carriers for undercharges, and claims of the Government—by way of counterclaim—for overcharges. The carriers' right to claim undercharges is limited by Section 2501, Title 28, U. S. Code, and such claims must be filed within six years from the accrual of the right of action. The Government's claims for overcharges, on the other hand, are not subject to any limitation because there is no statute which prescribes any limitation on such claims.[9] The Government may interpose claims for overcharges by way of counterclaim whenever a carrier sues for undercharges, or the General Accounting Office at any time may make deductions from other bills to recover overpayments on earlier bills (Section 66, Title 49, U. S. Code).

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[9] Congress has unquestioned power to bar recovery on Government claims if it sees fit. E.g., Section 4(c) of the Act of June 29, 1948, 62 Stat. 1070; *United States* v. *Lindsay*, 346 U.S. 568.

It is clear that the decision of the Court of Claims in these cases involves no misconstruction of Section 16(3) of the Interstate Commerce Act and is in accord with the decisions of this court and the Commission.

3. The third reason stated for granting the writs in these cases is a reiteration of the argument that the Court of Claims decided these cases—and the previous *Union Pacific* case—wrongly. This argument has been answered, pages 11-15 above, in replying to the Government's statement of the questions presented. To a large extent the Government relies on the dissenting opinion of Judge Madden and particularly to the statements that "the whole reason and justification for charging high rates for the carriage of [these] objects is their incendiary and extra-hazardous character" and that "the plaintiffs do not attempt to justify the high rates on the basis of high hazards." These statements are unsupported by anything in the record or otherwise. The making of freight classifications and rates which are just and reasonable, all of which is subject to regulation by the Interstate Commerce Commission, is not so simple a matter. There are many things—in addition to hazard—considered by the rate makers and by the Commission in determining whether rates and classifications are just and reasonable. Transportation characteristics such as weight and bulk per cubic foot, value per pound, packaging, the likelihood of loss, damage, or pilferage, the cost of handling or of protection, the volume of movement, are some of the considerations. Commercial and trade conditions, ratings on analogous articles, and competition between railroads, between localities, between manufacturers, and between articles used for similar purposes, may be important factors. In a case called the *Consolidated*

Classification case, 262 I.C.C. 508-509, the Commission said:

> "The primary purpose of a freight classification is to assign each article, or a group of articles, to a class according to well-known classification principles or elements which recognize distinctions from a transportation standpoint, along fairly broad lines, in order to meet the needs of commerce. None of the principles or elements should be controlling, but all that are relevant should be considered."

The suggestion that the respondents should "justify" the reasonableness of the published rates (or Section 22 agreed rates) claimed and found to be applicable has already been answered, pages 14-15 above. To attempt in any case to "justify" the rates found to be applicable would be to convert the hearing by the Court of Claims of a transportation case—which can only properly involve the question of the application of the published or agreed rates—into an Interstate Commerce Commission case for the determination of just and reasonable rates.

The following quotation from the opinion of this court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251, although in a federal power case applies equally to cases which involve questions of the reasonableness of freight rates and the jurisdiction of the courts and the Interstate Commerce Commission:

> "But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that

power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one."

CONCLUSION

In short, there is no justification for asking this court to review the judgments of the Court of Claims in these cases, on either of the two questions stated or for the reasons stated.

It is also apparent that the basic reason for seeking the writs of certiorari in these cases is to obtain a review by this court of the decision of the Court of Claims in the *Union Pacific* case, 125 C. Cls. 390. The Government did not apply for certiorari in that case and the judgment became final and conclusive. *Williams* v. *United States,* 289 U. S. 553, 564; *United States* v. *Munsingwear,* 340 U. S. 36. In these cases the Government has stipulated that the issue is the same and that unpaid balances on their freight bills are due the respondents on the basis of the decision in the *Union Pacific* case in the amounts stated. On the record in these cases the Court of Claims reconsidered that decision and came to the same conclusion and entered judgments for the respondents in the amounts stipulated.

Although the parties in these cases and in the *Union Pacific* case are different and the judgment in the latter is not properly *res judicata* in these cases, the following statement by this Court in *United States* v. *Munsingwear* 340 U. S. 36, 41, is apposite:

> "The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

Respectfully submitted,

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